Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

RAYMOND POLANCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HERALD PRICE FAHRINGER *
ERICA T. DUBNO
FAHRINGER & DUBNO
780 Third Avenue, 32nd Floor
New York, New York 10017
(212) 319-5351

Counsel for Petitioner

* Counsel of Record

QUESTIONS PRESENTED

Whether a federal criminal defendant, who asserts a claim of ineffective assistance of counsel in a habeas corpus proceeding, is denied due process and the right of confrontation where his petition is dismissed without the hearing required by 28 U.S.C. § 2255, based solely upon his trial lawyer's affidavit that disputed his own ineffectiveness.

Where a criminal defendant has a constitutional right to testify on his own behalf, can his lawyer's refusal to let him invoke that right ever be considered a "tactical" decision in order to defeat his Sixth Amendment claim that he was denied the effective assistance of counsel?

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Rule 30.1. 2

Petitioner Raymond Polanco respectfully requests that a Writ of Certiorari be issued to review the judgment and order of the United States Court of Appeals for the Second Circuit entered in this proceeding. The order was filed on May 4, 2006.

OPINIONS AND ORDERS BELOW

(1) An unpublished "summary order" of the Court of Appeals for the Second Circuit, dated May 4, 2006, denying Petitioner a Certificate of Appealability from the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, is reprinted in the Appendix hereto, App. 1.

(2) Petitioner timely filed his § 2255 petition to vacate his life sentence on January 10, 2000 in the United States District Court for the Eastern District of New York. More than five years later, on May 12, 2005, District Judge Sterling Johnson, Jr., issued an unpublished order denying the petition. The court declined to issue a Certificate of Appealability. *See* App. 3-13.

(3) During Petitioner's direct appeal, on May 28, 1998, the Second Circuit reversed his convictions relating to a life sentence and a 30-year consecutive sentence. It also vacated a separate consecutive life sentence. However, the court affirmed the remaining counts. The decision is reprinted at App. 15-28, and published at *United States v. Polanco*, 145 F.3d 536 (2d Cir. 1998). On July 28, 1998, the Second Circuit denied a petition for rehearing and rehearing *en banc*. *See* App. 29-30. On January 11, 1999, this Court denied his petition for a Writ of Certiorari. *Polanco v. United States*, 525 U.S. 1071 (1999).

JURISDICTION

The order of the Second Circuit was filed on May 4, 2006. The 90-day period for filing this petition for certiorari expires on August 2, 2006. *See* Rule 30.1. The jurisdiction of this Court to review the ruling of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that no person shall, in a criminal case, "be a witness against himself" and shall not be "deprived of life, liberty, or property, without due process of law."

The Sixth Amendment further instructs that:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255, known as a habeas corpus statute, provides in pertinent part:

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of facts and conclusions of law with respect thereto.

28 U.S.C. § 2253, governing appeals in habeas corpus proceedings, provides, in pertinent part:

> (a) In a habeas corpus proceeding ... before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> * * *
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from — (B) the final order in a proceeding under section 2255.
>
> * * *
>
> (c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On April 26, 1996, Raymond Polanco was arrested on charges of selling and distributing narcotics and was ultimately charged in a 13-count superseding indictment (A.23).[1] The full force of the indictment was borne on the first count, which alleged a multifarious RICO charge that contained seven separate racketeering acts (A.25-29). The RICO count charged that between January 1989 and December 31, 1994, Mr. Polanco participated in a pattern of racketeering activity in that he unlawfully possessed weapons, distributed drugs and committed a series of murders — in violation of 18 U.S.C. § 1962(c).[2]

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[1] Numbers contained within parenthesis preceded by "Tr." refer to the pages of the trial transcript. Numbers preceded by "A." refer to pages of Raymond Polanco's Appendix filed in connection with his direct appeal in *United States v. Raymond Polanco*, No. 97-1396. A copy of that Appendix was annexed as Exhibit A to counsel's declaration filed in the district court in support of the § 2255 petition.

[2] Trailing the RICO count were three substantive counts (Counts 2, 4 and 5) that charged the commission of the same homicides as in the RICO count, which were alleged to have been committed in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1) (A.29-32). Counts 3, 6 and 7 accompanied the homicide counts and charged the use of a firearm to commit the homicides, and an attempted homicide, in violation of 18 U.S.C. § 924(c) (A.30-33). Count 8 charged Raymond Polanco with conspiring to possess and distribute narcotics in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (A.33). Count 9 charged a continuing criminal enterprise in violation of 21 U.S.C. §§ 848(a) and 848(c) (A.33-34). And, finally, at the tail end of the indictment were four substantive drug counts involving the possession of narcotics, with the intent to distribute them, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A) (Counts 10, 11, 12 and 13) (A.34-35).

The trial commenced on February 3, 1997, before Judge Johnson and a jury in the United States District Court for the Eastern District of New York. On March 5, 1997, the jury found Raymond Polanco guilty on all counts except the use of a gun to commit two homicides (A.222-33). On June 26, 1997, Judge Johnson sentenced Mr. Polanco to *five consecutive life terms* plus 120 years of incarceration (A.266).[3]

On the ensuing appeal, the Second Circuit reversed one life sentence and a 30-year sentence. The court also vacated a second life sentence. However, the Court affirmed the remaining charges and declined to grant rehearing on July 22, 1998. App. 23-28.

On January 11, 1999, this Court denied Raymond Polanco's petition for a Writ of Certiorari. *See Polanco v. United States*, 525 U.S. 1071 (1999). Mr. Polanco then timely filed a petition to vacate his sentence under 28 U.S.C. § 2255 on January 10, 2000.

The petition raised a number of constitutional complaints, including the fact that Raymond Polanco was denied the effective assistance of counsel, which doomed him to a conviction and life imprisonment. Petitioner's sworn statement established that he had indicated to his attorney that he wanted to testify at trial. However, defense counsel responded, in sum or substance, that he would walk out of the case if Raymond Polanco persisted in taking the witness stand. Thus, Petitioner was left with no alternative but to forego his constitutional right to testify.

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[3] Petitioner was sentenced to consecutive life sentences on Counts 1, 2, 4, 8 and 9; 10 years imprisonment on Count 5; 20-year sentences on Counts 10, 11, 12 and 13; and 30-years imprisonment on Count 3.

On May 23, 2005, the district court denied the § 2255 petition and refused to issue a Certificate of Appealability. App. 3-13. In denying the petition, the district court relied on an affidavit submitted by trial counsel that disputed Petitioner's claims. App. 8-9. The court declined to grant an evidentiary hearing under the mandatory language of 28 U.S.C. § 2255 and never afforded Petitioner any opportunity to cross-examine or confront counsel's affidavit.

On May 4, 2006, the United States Court of Appeals for the Second Circuit denied Raymond Polanco's application for a Certificate of Appealability and dismissed the appeal. The court merely stated that Petitioner had not made a "substantial showing of the denial of a constitutional right." App. 1.

REASONS FOR GRANTING CERTIORARI

I. Pursuant to the Mandates of 28 U.S.C. § 2255, which Require a Prompt Hearing Unless the Record Conclusively Shows that the Petitioner is Entitled to No Relief, the Petitioner was Denied his Constitutional Rights where the District Court took More than Five Years to Deny his Fifth and Sixth Amendment Claims, Without a Hearing, Based Upon an Affidavit Submitted by Counsel Disputing his Ineffectiveness, Which was Not Subjected to Cross-Examination

Petitioner Raymond Polanco has been condemned to prison for the balance of his natural life based upon a conviction that was obtained by unconstitutional means. This simple statement suggests the awful solemnity of the occasion that causes us to seek this Writ of Certiorari.

This case presents the compelling and recurring question of whether a defendant's Sixth Amendment challenge to the effectiveness of his trial counsel can be defeated by the mere submission of an affidavit by the attorney, which disputes his own ineffectiveness, instead of granting an evidentiary hearing as required by 28 U.S.C. § 2255. The statutory provision unambiguously requires that

> [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, *grant a prompt hearing thereon*, determine the issues and make findings of fact and conclusions of law with respect thereto (emphasis supplied).

Nevertheless, the Second Circuit recently adopted a dangerous rule that, we urge, is in direct defiance of the statute where it authorizes district courts to resolve § 2255 claims without the mandatory hearing. *See, e.g., Chang v. United States*, 250 F.3d 79, 85 (2d Cir. 2001). As a consequence, critical constitutional claims are being rejected, in cases such as this, based solely upon affidavits submitted by attorneys disputing their ineffectiveness — without petitioners ever being afforded their right to cross-examine or confront the attorneys' assertions.

However, such a distortion of the right to a hearing created by Congress in § 2255 has crucial ramifications for defendants throughout the nation. Moreover, if this nullification of the right to a hearing under § 2255 is to become the law of the land, then this Court should make that final determination.

The Second Circuit's rule derives from a misunderstanding of this Court's decision in *Machibroda v. United States*, 368 U.S. 487, 495 (1962), where this Court remanded for a *hearing* to investigate the claims. There, the Court's focus was on whether an incarcerated prisoner must be produced for the hearing. It is urged that this Court never meant to hold that the hearing process, mandated by statute, could be avoided by the submission of an affidavit when constitutional claims of this magnitude are at stake.

This is an issue of mounting and continuing concern because petitioners, such as Raymond Polanco, are repeatedly having their Sixth Amendment claims summarily dismissed without ever being afforded any opportunity to examine the ineffectiveness of the attorney. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court recently amplified the right of confrontation, particularly where it relates to affidavits and other forms of documents.

Here, the district court merely embraced what the attorney said in his affidavit and, at the same time, denied Petitioner his right to confront counsel at a hearing. This substantially prejudiced Raymond Polanco. The basic unfairness of the Second Circuit's rule, which undermines petitioners' rights to a hearing guaranteed under § 2255, adds to the appropriateness of a grant of certiorari in this case. Now is the time for this Court to resolve this perennial question.

Prisoners who have been convicted mistakenly, because of constitutional errors, suffer a grievous wrong and, at the very least, should be entitled to a hearing into the substance of their claims. This is especially true where a defendant has been sentenced to spend the rest of his life in prison. The denial of a hearing to investigate these constitutional claims, which are now fully available in § 2255 proceedings, rather than on direct appeal, is bound to erode our confidence in the criminal justice system and degrade the right to the effective assistance of counsel. *See Massaro v. United States*, 538 U.S. 500 (2003).

II. The Petitioner Made a Substantial Showing of the Denial of a Constitutional Right Where his Defense Attorney Refused to Allow Him to Exercise his Constitutional Right to Testify on his Own Behalf Under Threat that, if He Did So, Counsel Would Immediately Cease Defending Him

This Petition is also justified to resolve the serious question of whether a defendant is denied the effective assistance of counsel, and due process, where his trial lawyer threatens to quit defending him if the defendant dares to testify on his own behalf.

This Court has long recognized that a defendant's right to testify at his criminal trial "has sources in several provisions of the Constitution," including the due process clauses of the Fifth and Fourteenth Amendments as well as the Compulsory Process Clause of the Sixth Amendment. In fact, the accused's right to testify is "[e]ven more fundamental to a personal defense than the right of self-representation." *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987).[4]

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[4] The "opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.*

Moreover, whether to testify is a matter of constitutional right. *See Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). It is also well settled that "the accused has the ultimate authority to make certain fundamental decisions regarding [his] case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).[5]

One of the crucial questions raised in this petition is whether a lawyer's frustrating of that right of choice constitutes ineffective assistance of counsel. Here, Petitioner was deprived of this indispensable constitutional right when his trial counsel interfered with his right to testify. Raymond Polanco understood that if he insisted on testifying counsel would walk out of the case. This left him with the untenable choice of either going on without representation in the middle of the trial or not testifying.

Such a foreboding threat of denying a defendant representation in the midst of trial constitutes ineffective assistance of counsel under the Sixth Amendment. Furthermore, since a defendant has an absolute right to testify on his own behalf, his lawyer's refusal to let him take the witness stand can never be excused as a tactical decision to defeat his claim of ineffective assistance of counsel.

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[5] There is "no rational justification for prohibiting the sworn testimony of the accused." *Ferguson v. Georgia*, 365 U.S. 570, 583 (1961). The constitutional recognition of this right was confirmed in *Rock v. Arkansas*, 483 U.S. 44, 53 n.8 (1987), where this Court stated that the "right to be heard, which is so essential to due process in an adversary system of adjudication, [can] be vindicated only by affording an opportunity to testify before the fact finder."

As a consequence, Raymond Polanco, who is currently suffering a life sentence even though he never had an opportunity to testify at his trial, sought relief in this § 2255 petition. The district court took *five long years* to dismiss the petition without even conducting a hearing — despite the dictates of § 2255, which call for a *prompt hearing*. And, as developed above, he was never afforded an opportunity to confront his trial attorney on the ineffectiveness claim.

To make matters infinitely worse, the Court of Appeals refused to even consider the merits of this importance constitutional claim by declining to grant a Certificate of Appealability. However, Petitioner made a substantial showing of the denial of a constitutional right to warrant the issuance of a Certificate of Appealability. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003). And, further appellate review in this instance is facilitated by the pure nature of the straightforward constitutional issues presented.

Certainly the question of whether subjecting a defendant to such a Hobson's Choice, i.e., foregoing his right to testify or losing his counsel, deprives a defendant of his constitutional rights, is sufficiently "debatable" to warrant a Certificate of Appealability. Of course, a defendant does not relinquish his right to testify by engaging counsel. *See United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (*en banc*).

Moreover, Raymond Polanco was profoundly prejudiced by counsel's refusal to allow him to testify. Had Mr. Polanco been allowed to testify there is a reasonable probability that the result of the proceeding would have been very different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Thus, where Petitioner was effectively precluded by counsel from taking the stand, his conviction was clearly obtained in violation of his constitutional rights and should be vacated. At the very least, a Certificate of Appealability should be granted so that the merits of Raymond Polanco's constitutional claims may finally be resolved in the Circuit Court.

Surely when a man has been sentenced to spend the rest of his *natural life in prison*, he is entitled to a hearing on his constitutional claims that he was denied the effective assistance of counsel. Raymond Polanco asks for nothing more and justice requires nothing less.

CONCLUSION

For all the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the Second Circuit's order in this case.

August 2, 2006

Respectfully submitted,

HERALD PRICE FAHRINGER *
ERICA T. DUBNO
FAHRINGER & DUBNO
780 Third Avenue, 32nd Floor
New York, New York 10017
(212) 319-5351

Counsel for Petitioner

* Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

E.D.N.Y.
00-cv-190
Johnson, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 4th day of May, two thousand and six,

UNITED STATES COURT OF APPEALS
FILED
MAY 4 2006
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Present:

Hon. Jon O. Newman,
Hon. Chester J. Straub,
Hon. Robert A. Katzmann,
Circuit Judges.

Raymond Polanco,

Petitioner-Appellant,

v.

United States of America,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is DENIED and the appeal is DISMISSED, because the appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

MAY 4 2006

By: /s/ Lucille Carr

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RAYMOND POLANCO,

Petitioner,

-against-

UNITED STATES,

Respondent.

----------X

00 CV 0190 (SJ)

MEMORANDUM AND ORDER

APPEARANCES:

LIPSITZ, GREEN, FAHRINGER, ROLL,
SALISBURY & CAMBRIA, LLP
780 Third Avenue, 32nd Floor
New York, NY 10017
By: Herald Price Fahringer
Attorney for Petitioner

UNITED STATES ATTORNEYS OFFICE
One Pierrepont Plaza
Brooklyn, NY 11201
By: Paul Terry Weinstein
Attorney for Respondent

JOHNSON, Senior District Judge:

Presently before the Court is a Motion by Petitioner Raymond Polanco ("Petitioner") to vacate, set aside, or correct his sentence, or for a hearing before this Court, pursuant to 28 U.S.C. § 2255. For the reasons stated herein, Petitioner's Motion for relief is DENIED.

Petitioner has asserted the following bases for relief: 1) trial counsel was ineffective in that he allegedly denied Petitioner the right to testify on his own behalf at trial; 2) scientific testing of evidence by the Federal Bureau of Investigation ("F.B.I.") may have been tainted, due to "substantial corruption and malfeasance" in the F.B.I.; 3) the government's alleged failure to disclose that certain witnesses may have been confidential informants deprived Petitioner of due process and the right to confront witnesses against him; and 4) "various other bases which warrant the granting of a new trial." (Mem. Law. Supp. § 2255 Pet.)[1]

BACKGROUND

Petitioner was convicted after trial of racketeering in violation of 18 U.S.C. § 1962(c); murder and attempted murder in aid of racketeering (in connection to his involvement in the "Red Top Crew") in violation of 18 U.S.C. § 1959(a); use of a machine gun during one of the murders in violation of 18 U.S.C. § 924(c); conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A); operating a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. §§ 848(a), 848(c); and distribution of crack cocaine in violation of 21 U.S.C.

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[1] For reasons that are unclear to the Court, Petitioner's Motion Under 28 U.S.C. § 2255 lists six grounds for relief, while Petitioner's Memorandum of Law in support of that Motion only includes four points, and there appears to be no relationship between the ordering of the grounds listed in the Motion and the ordering of the points listed in the Memorandum of Law (for example, ground six in the Motion is point one in the Memorandum). (*See* Mot. Under 28 U.S.C. § 2255 at 5-6; Mem. Law Supp. § 2255 Mot.) Additionally, the claims referenced in grounds one, two, and four in the Motion are described in terms too general for the Court to identify their substance. For all these reasons, the Court is forced to assume that Petitioner is seeking relief only on the grounds identified in the Memorandum of Law.

§§ 841(a)(1), 841(b)(1)(C). Petitioner was sentenced to five consecutive life terms of life imprisonment plus 120 years. *United States v. Polanco,* 145 F.3d 536 (2d Cir. 1998).

On appeal, the Second Circuit reversed the convictions for murder in aid of racketeering in violation of 18 U.S.C. § 1959(a) and use of a machine gun during the murder in violation of 18 U.S.C. § 924(c), based on the finding that there was insufficient evidence to demonstrate that Petitioner committed the murder for the purpose of increasing or maintaining his position in the Red Top Crew. *Id.* at 539-540. The Second Circuit also vacated Petitioner's conviction for conspiracy to distribute cocaine base in violation of 21 U.S.C. §§ 846, 841(b)(1)(A), finding that a conviction on both that charge and the charge of operating a CCE violated the Double Jeopardy Clause of the Fifth Amendment, since the alleged CCE was the same enterprise as the conspiracy. *Id.* at 541. The Second Circuit sustained Petitioner's convictions on the other charges, including murder and attempted murder. *See id.*

DISCUSSION

I. Ineffective Assistance of Counsel

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court established a two-part test to determine whether an attorney's assistance was ineffective. First, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness .... under prevailing professional norms." *Id.* at 688. In order to satisfy the first prong of *Strickland,* Petitioner must overcome the strong presumption that the challenged action or inaction may be considered reasonable trial strategy. *Id.* at 689. Second, a petitioner must show that counsel's performance prejudiced his defense. *Id.* at 689.

To show prejudice, a petitioner must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* at 694.

Petitioner's ineffective assistance claim is premised on the argument that his trial attorney prevented him from testifying in his own defense at trial. Petitioner states that "when he indicated to his attorney that he wanted to testify at trial, defense counsel stated, in sum or substance, that counsel would walk out of the case-leaving [Petitioner] with no alternative but to forego his constitutional right to testify." (Mem. Law Supp. § 2255 Pet. at 11.)

Petitioner is of course correct that a criminal defendant has a right to testify in his own defense and that a lawyer who actually bars a defendant from doing so may be found ineffective. *Brown v. Artuz,* 124 F.3d 73, 79-80 (2d Cir. 1997). However, Petitioner's submissions focus almost exclusively on the *legal* basis of his claim regarding a defendant's right to testify-a point which is not actually in dispute. (*See* Mem. Law Opp'n § 2255 Mot. at 9 (acknowledging that a defendant has a right to take the stand in his own defense and that an ineffectiveness claim may be premised on a lawyer's failure to permit him to do so).) What Petitioner's submissions fail to sufficiently address is the *factual* basis of his claim. Petitioner has not submitted a sworn affidavit stating that he wished to testify at trial, nor has he provided the Court with any indication of what the substance of his testimony would have been.

As Petitioner appears to recognize (*see* Repl. Mem. Law at 7), Petitioner's failure to supply an affidavit or give any description of his proposed testimony distinguishes his case from others in which a hearing or other relief was granted. *E.g. Rega v. United States,* 2000 WL 356403

(S.D.N.Y. Apr. 6, 2000);[2] *Glick v. United States,* 1998 WL 315065 (E.D.N.Y. June 11, 1998). As other courts have noted, "without more, a [petitioner's] 'barebones assertion' that his attorney told him not to testify in his own defense, even if that assertion is made under oath, has been held to be insufficient to justify a hearing or other action on a petitioner's claim that his right to testify in his own defense was denied him." *Scire v. United States,* 1997 WL 138991, *11 (E.D.N.Y. Mar. 24, 1997) (citing *Underwood v. Clark,* 939 F.2d 473, 476 (7th Cir. 1991)); *see also Acevedo v. Demskie,* 1999 WL 325055 (E.D.N.Y. May 11, 1999); *Millian v. United States,* 1997 WL 793113 (E.D.N.Y. Nov. 18, 1997).

Counsel states that Petitioner was unable to supply an affidavit or further information regarding his proposed testimony because of communication difficulties due to Petitioner's transfer between facilities and lack of access to mail. (Repl. Mem. Law. at 7-9.) The Court notes, however, that by the time that Petitioner's counsel submitted the Reply Memorandum of Law, in which he stated that he was unable to further detail Petitioner's ineffectiveness claim without continued communication with Petitioner, he had been representing Petitioner for over two years.[3] During this time, apart from representing Petitioner on appeal, he had managed to file a Motion for § 2255 relief, a Memorandum of Law in support of that Motion, a Declaration in ıpport of the Motion, and a Reply Memorandum of Law in further support of the Motion.

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[2] The lower court decision in *Rega* was reversed by the Second Circuit after Petitioner's Motion was filed. *Rega v. United States,* 263 F.3d 18 (2d Cir. 2001).

[3] Petitioner's counsel, Harold Price Fahringer, represented Petitioner during his appeal to the Second Circuit, which was argued March 9, 1998, and filed the Reply Memorandum of Law on June 30, 2000.

Accordingly, it is not clear why counsel would be unable to describe the basic substance of Petitioner's ineffectiveness claim at such a late date in the proceedings.[4] Petitioner has not cited any case law to support the proposition that this Court should excuse Petitioner's failure to provide an affidavit or any description of the proposed testimony.

Finally, not only does Petitioner "not allude to any evidence that might substantiate his claim that his counsel denied him the right to testify in his own defense", instead "merely stat[ing] his claim in his Memorandum of Law, failing to provide even his own sworn statement to support his allegation," *Scire,* 1997 WL 138991 at *11, Petitioner's assertions are contradicted by the representations in his trial attorney's sworn affidavit.[5] The Court finds

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[4] Counsel was also granted two extensions in the time to file his Reply Memorandum of Law. (Endorsed Order on Letter from Harold Price Fahringer to the Court, Apr. 24, 2000; Endorsed Order on Letter from Harold Price Fahringer to the Court, May 19, 2000.) Counsel did not attempt to obtain a third extension. The Court also notes that Petitioner has sent numerous letters to the Court, but has made no attempt in these letters to outline his proposed testimony. (*See* Letter from Petitioner to the Court, Mar. 4, 2003; Letter from Petitioner to the Court, Mar. 12, 2003; Letter from Petitioner to the Court, Mar. 23, 2003; Letter from Petitioner to the Court, Mar. 26, 2003; Letter from Petitioner to the Court, Jun. 5, 2003.)

[5] Petitioner's trial counsel states that:

> 2. During the trial the question of whether or not Polanco should take the stand was the subject of many discussions among Polanco, co-counsel James Moriarity and myself. Both counsel, Moriarity and myself strongly advised Polanco that in our opinion he should not take the stand.
>
> 3. Polanco apparently discussed our advice with members of his family who it was related to me strongly supported our advice. I was advised that one or more of them may have told Polanco that I would walk off the case if he decided to take the stand. This information and threat did not come from Moriarity or me, and we immediately took steps to correct it.

that Petitioner has not demonstrated that counsel's performance was deficient, as required for a finding of ineffectiveness under *Strickland.* 466 U.S. at 688. Petitioner's claim is therefore denied.

II. Alleged Errors in F.B.I. Testing of Evidence

Petitioner states that after the verdict was rendered in his case, "it [was] revealed by a Justice Department report that the Federal Bureau of Investigation's crime laboratories have provided flawed evidence in some major cases. . . . Furthermore, F.B.I. officials have recently admitted that several hundred cases are currently being reviewed for exculpatory evidence that would help defendants win new trials or overturn convictions." (Mem. Law Supp. § 2255 Pet. at 14.) Petitioner has presented absolutely no evidence that his case was one of the cases in which flawed evidence was provided by the F.B.I.

The Court cannot grant any relief at this time based on the entirely hypothetical supposition that flawed evidence was presented in Petitioner's case. If Petitioner does at some point obtain any actual evidence in support of his claim, he may file a successive habeas petition based on newly discovered evidence. *See* 28 U.S.C. § 2255.

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4. We visited Polanco for several hours (I believe on a Sunday) explaining in detail that although it was our strong advice that he not take the stand it was his absolute constitutional right to do so if he chose. We also advised him that there was no truth to the statement that if he did so we or I would walk off his case. I opined that this was just their (his family's) attempt at convincing him to not [sic] take the stand but that it was his choice alone. If he chose to take the stand against our advice that was his right and we would continue to defend him to the best of our ability. He was advised that [sic] was the law.

(Aff. of Gerald J. Di Chiara, Aug. 7, 2003, ¶ ¶ 2-4.)

The Court also finds that it is unnecessary to grant an order of discovery since, as Petitioner himself has acknowledged, the F.B.I. is already searching for exculpatory evidence that would help defendants win new trials or overturn convictions, evidently planning to notify the individuals whose cases are affected. (*Id.*) Additionally, it is not clear how an order of discovery would be of any use to Petitioner considering the extremely limited role of F.B.I. evidence in the case. Petitioner's claims are therefore denied.

III. Confidential Informants

Petitioner asserts that since his trial, he "subsequently learned that several of the witnesses who testified on behalf of the government and against him at trial may well have been confidential informants prior to the period discussed at trial." (Mem. Law Supp. § 2255 Mot. at 17.) Despite Petitioner's suggestion that "several" witnesses were secretly confidential informants at an earlier date, the Court must construe his argument as a claim regarding exactly one witness, Michael Rivera, because Michael Rivera is the only witness that Petitioner has actually identified in relation to this claim. (*Id.* at 17; Repl. Mem. Law at 4-7.)[6]

Again, Petitioner has completely failed to supply the Court with any factual support for his claim. Petitioner neither explains how or when he allegedly learned that Rivera was a confidential informant, nor produces any evidence to verify this claim. Petitioner appears, rather, to concede the lack of evidence that Rivera was a

[6] Petitioner fails to explain how it is that he learned that "several witnesses" were confidential informants without learning who these witnesses were.

confidential informant before the date given during trial testimony, in that Petitioner states all his claims on this point in a conditional manner:

> *If* Michael Rivera had, in fact, been working for the government prior to the time indicated at trial then the prosecution *may well* have suborned perjury by failing to disclose this critical information. Furthermore, the defense *would* have been deprived of the opportunity to discredit and impeach Rivera with this dynamic proof.

(Mem. Law Supp. § 2255 Mot. at 17 (emphasis added).)[7]

In this claim, as in his others, Petitioner's counsel appears to misunderstand the basic nature of habeas relief. Having already met its burden of proving Petitioner's guilt at trial, and having prevailed again on direct appeal, the government is not, at this stage, responsible for proving its case against Petitioner yet again in response to any and every vague and unsubstantiated claim that Petitioner decides to set forth. Rather, on a motion to vacate a sentence, the petitioner has the burden of showing that he is entitled to relief. *E.g. United States v. Purdy,* 245 F.Supp.2d 411, 414 (D.Conn. 1999) (citing 28 U.S.C. § 2255.) "A collateral attack on a criminal conviction must overcome the threshold hurdle that the challenged judgment carries with it a presumption of regularity." *Williams v. United States,* 481 F.2d 339, 346 (2d Cir. 1973). In other words, Petitioner cannot shift the burden of demonstrating his guilt back to the Government

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[7] Petitioner's strongest statement on this point is that he "now has reason to believe that [Rivera] was, in fact, a confidential informant substantially earlier than disclosed at trial." (*Id.*) However, Petitioner at no point explains what the "reason to believe" is.

simply by asserting legal arguments and demanding that the Government come forward with evidence. Accordingly, Petitioner's claim is denied.

VI. "Various Other Bases" for Relief

The additional claims asserted by Petitioner consist of unsupported assertions that: Petitioner wished to testify before the Grand Jury but was not permitted to do so, that I should have recused myself from the case due to my work as a Special Narcotics Prosecutor, that Petitioner should be resentenced due to the Second Circuit's voiding of certain of Petitioner's convictions, and that until Petitioner is resentenced his sentence is in violation of the Double Jeopardy Clause. (Mem. Law Supp. § 2255 Mot. at 25-29.) These claims, like the others, are vague and lacking in any attempt at evidentiary support. Additionally, with the exception of the recusal argument, none of these claims are supported by a single reference to relevant case law or statutes. Accordingly, the Court finds that Petitioner has wholly failed to meet his burden of demonstrating that he is entitled to relief. *See Purdy,* 245 F.Supp.2d at 414.

Furthermore, the Court finds that the claims are procedurally barred due to Petitioner's failure to raise the claims at trial or on direct appeal.[8] A petitioner who raises claims that could have been raised at trial or on appeal, but were not raised, must demonstrate "cause" and "prejudice" for the failure to raise the claims earlier.

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[8] The Court finds that the Grand Jury and recusal arguments could have been raised at trial or on appeal, and the resentencing and double jeopardy arguments could have been presented to the Second Circuit on appeal.

Bousley v. United States, 523 U.S. 614, 622-23 (1998). Petitioner has made no attempt to make either showing, and thus the claims must be denied.

CONCLUSION

For the reasons stated herein, Petitioner's Motion for Relief pursuant to 28 U.S.C. § 2255 is DENIED. For a certificate of appealability to issue, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing "does not require a petitioner to demonstrate that he would prevail on the merits, but merely that 'reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Santana v. United States,* 2005 WL 180932, at *7 (S.D.N.Y. Jan. 26, 2005) (quoting *Rhagi v. Artuz,* 309 F.3d 103, 106 (2d Cir. 2002)) (internal quotation marks and citation omitted).

Where a petition is dismissed on procedural grounds, the petitioner seeking a certificate of appealability must show that both the procedural and underlying constitutional issues are reasonably debatable. *Sosa v. U.S.,* 2003 WL 22218505, *1 (S.D.N.Y. Sept. 25, 2003). Petitioner has made no substantial showing of the denial of a constitutional right in this case, nor any showing that the procedural issues are debatable. Accordingly, this Court denies a certificate of appealability.

The Clerk of Court is directed to enter a final judgment of dismissal and to close the case.

SO ORDERED.

Dated: May 12, 2005
Brooklyn, New York

/s/ Sterling Johnson
Senior U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1997

(Argued March 9, 1998 Decided May 28, 1998)

Docket No. 97-1396

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND POLANCO,

Defendant-Appellant.

Before: WALKER, OAKES, and MAGILL,[1] Circuit Judges.

The defendant was convicted in the United States District Court for the Eastern District of New York (Sterling Johnson, *District Judge*) of various crimes arising from his operation of a drug and gun trafficking enterprise. The defendant raises numerous claims of error on appeal, contending that the government failed to prove an essential element of his conviction under 18 U.S.C. § 1959 for committing murder for the purpose of increasing or maintaining his position in a criminal enterprise; that his convictions for conspiracy under 21 U.S.C. § 846 and for engaging in a continuing criminal enterprise under 21 U.S.C. § 848 violated the Double Jeopardy Clause; that he was unfairly prejudiced by the introduction of evidence of a murder that was not related to his criminal enterprise; and that his convictions were not supported by the evidence.

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[1] The Honorable Frank Magill, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

The defendant's convictions are affirmed in part, reversed in part, and vacated in part.

HERALD PRICE FAHRINGER (LIPSITZ, GREEN, FAHRINGER, ROLL, SALISBURY & CAMBRIA), New York, New York, *for Appellant.*

PAUL WEINSTEIN, Assistant United States Attorney (Zachary W. Carter, United States Attorney), New York, New York, *for Appellee.*

MAGILL, Circuit Judge:

Raymond Polanco appeals his convictions on various federal offenses related to his operation of a drug and gun trafficking enterprise. Polanco contends that: (1) the government failed to prove an essential element of his conviction for committing murder for the purpose of increasing or maintaining his position in a criminal enterprise under 18 U.S.C. § 1959; (2) his convictions for conspiracy under 21 U.S.C. § 846 and engaging in a continuing criminal enterprise under 21 U.S.C. § 848 violated the Double Jeopardy Clause; (3) he was unfairly prejudiced by the introduction of evidence of a murder that was not related to his criminal enterprise; and (4) his convictions were not supported by the evidence. We agree only with Polanco's first two contentions and, thus, affirm in part, reverse in part, and vacate in part.

I.

Viewing the evidence in the light most favorable to the verdict, appellant Raymond Polanco ran a narcotics and gun distribution organization in Brooklyn, New York (the Polanco Enterprise). The Polanco Enterprise consisted of more than five members who worked under Polanco's direction to distribute crack cocaine in the Gowanus Housing Project (the Project), a public housing complex located in Brooklyn. The Polanco Enterprise also included members specifically employed to rob and murder rival drug dealers in the Project so that Polanco could monopolize the drug trade within the Project. To this end, Polanco orchestrated the murder of Antonio Rivera and the attempted murder of Carlos Moreno, both of whom were Polanco's rivals.

In addition to selling crack cocaine in the Project, the Polanco Enterprise sold and distributed guns. Polanco sold guns to Lenin Sepulveda, the leader of a gang known as the Red Top Crew that distributed drugs in the Bronx, New York. Polanco supplied the Red Top Crew with handguns and machine guns. Each time Sepulveda purchased a machine gun from Polanco, Sepulveda would test the gun to verify that it was fully automatic before he would pay Polanco. During one machine gun sale, Sepulveda told Polanco "let's go to the highway [and] as soon as we get [to] the highway, we will test it [(the machine gun)] out." Tr. of Trial at 976 (Feb. 10, 1997). While Polanco drove Sepulveda to the highway, an innocent motorist, David Cargil, ran a red light and almost hit the car driven by Sepulveda's brother, which was in front of Polanco's car. In retaliation, Sepulveda decided to "test" the gun by killing Cargil. Polanco sped after Cargil so that Sepulveda could take a clear shot. When the machine gun did not fire, Polanco attempted to fix the gun. After the machine gun jammed a second time, Sepulveda told

Polanco that Sepulveda did not want the gun because the gun did not work. Polanco responded "yes, it works" and, this time, successfully repaired the gun. Sepulveda consequently shot and killed Cargil, enabling Polanco to consummate the sale.

On August 1, 1996, a thirteen-count indictment was issued naming Polanco as the sole defendant. In counts one, four, and five through thirteen (the Polanco Enterprise counts), the government charged Polanco with committing various illegal acts in connection with his operation of the Polanco Enterprise, including engaging in a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848, conspiring to distribute narcotics in violation of 21 U.S.C. § 846, and conducting the affairs of an enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). In counts two and three (the Red Top Crew counts), the government charged Polanco with murdering Cargil with a machine gun for the purpose of maintaining or increasing his position in the Red Top Crew in violation of 18 U.S.C. §§ 924(c) and 1959.

The jury returned a verdict of guilty on all counts except two of the Polanco Enterprise counts (counts six and seven). After the district court imposed a sentence of five consecutive life terms plus 120 years,[2] Polanco filed this appeal.

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[2] Polanco received consecutive life sentences on counts one, two, four, eight, and nine; a consecutive ten-year sentence on count five; consecutive twenty-year sentences on counts ten through thirteen; and a consecutive thirty-year sentence on count three.

II.

Polanco contends that his convictions on the Red Top Crew counts for violating §§ 924(c) and 1959(a) (counts two and three) should be reversed because the evidence is insufficient to support a finding that Polanco murdered Cargil for the purpose of maintaining or increasing his position in the Red Top Crew. When reviewing a claim for insufficiency of the evidence, this court views "the evidence in the light most favorable to the government and ask[s] whether any rational juror could have reached a finding of guilt beyond a reasonable doubt." *United States v. Eltayib,* 88 F.3d 157, 171 (2d Cir.), *cert. denied,* 117 S.Ct. 619 (1996). "An appellant challenging the sufficiency of the evidence bears a very heavy burden," and a "jury's verdict will be sustained if there is substantial evidence to support it." *United States v. Casamento,* 887 F.2d 1141, 1156 (2d Cir. 1989).

We agree that the evidence is insufficient to support Polanco's convictions on the Red Top Crew counts. Count two was premised on 18 U.S.C. § 1959(a), which proscribes committing murder "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity. . . ." 18 U.S.C. § 1959(a). The government specifically indicted and prosecuted Polanco on the theory that Polanco killed Cargil for the purpose of maintaining or increasing his position in the Red Top Crew. *See* Superseding Indictment ¶ 29, *reprinted in* App. at 30 (count two charging Polanco with murdering Cargil "for the purpose of maintaining and increasing [his] position in [the Red Top Crew]"); Tr. of Trial at 2527 (Mar. 5, 1997) (district court charging the jury that to convict Polanco under count two, they must

find that Polanco participated in Cargil's murder "because he intended that it would help him maintain or even enhance his own position or prestige within the [Red Top Crew]").

Because the government elected to prosecute count two solely under this theory, the government bears the burden of proving:

> (1) that the [Red Top Crew] was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that [Polanco] had a position in the enterprise, (4) that [Polanco] committed the alleged crime of violence, and (5) that his general purpose in so doing was to maintain or increase his position in the enterprise.

United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992). Polanco contends that the government failed to prove that Polanco had a position in the Red Top Crew and, therefore, that Cargil's murder could not have been intended to maintain or increase his position in the Red Top Crew. The government argues that Polanco had a position in the Red Top Crew because Polanco "supplied them weapons." Tr. of Trial at 2283 (Mar. 4, 1997); *see also* Appellee's Br. at 41. We agree with Polanco.

While § 1959(a) does not specifically define the phrase "for the purpose of . . . maintaining or increasing position in an enterprise," its legislative history indicates that this phrase was enacted specifically to complement RICO by targeting criminal enterprise "members" who commit violent crimes "as an aspect of membership" in the enterprise. *See* S.Rep. No. 225, at 306, *reprinted in* 1984 USCCAN at 3486. Accordingly, the government must establish that Polanco "committed his violent crime because he knew it was expected of him by reason of

his membership in the enterprise or that he committed it in furtherance of that membership." *Concepcion,* 983 F.2d at 381.

In this case, it is clear that Polanco was not a member of the Red Top Crew at the time of Cargil's murder. Viewing the evidence in the light most favorable to the government, the Red Top Crew was a drug trafficking enterprise that operated independently and in a different section of New York City from the Polanco Enterprise. No witnesses testified that Polanco was a member of the Red Top Crew. The only testimony on this question came from Sepulveda, who specifically testified that there were only three different positions in the Red Top Crew: "managers and pitchers and transporters," *see* Tr. of Trial at 930 (Feb. 10, 1997), and that Polanco was *not* a member of the Red Top Crew. *See id.* at 1069. No evidence suggests that Polanco held any of these positions in the Red Top Crew. Based on the evidence introduced at trial, Polanco was not involved with the Red Top Crew's drug trafficking at all; he did not buy drugs from, sell drugs to, or distribute drugs for, the Red Top Crew. While the evidence demonstrates that Polanco sold guns to the Red Top Crew, the evidence also clearly shows that Polanco's relationship with the Red Top Crew did not exceed a vendor-vendee relationship, and that Polanco had no role in determining how or why the Red Top Crew would use the guns. *See id.* at 967 (Sepulveda testifying that he was the person who decided "what was going to be done with" each gun purchased from Polanco). Because Polanco was not a member of the Red

Top Crew, Cargil's murder could not have been committed for the purpose of maintaining or increasing Polanco's position in the Red Top Crew.[3]

Accordingly, we reverse Polanco's conviction on count two. Because we reverse this conviction, we also reverse his derivative conviction under 18 U.S.C. § 924(c) (count three) for utilizing a machine gun to murder Cargil. The jury instructions clearly permitted a conviction on this count only if the government proved that Polanco had a position in the Red Top Crew and murdered Cargil to maintain or increase his position in the Red Top Crew, *see* Tr. of Trial at 2536 (Mar. 5, 1997), and the government failed to offer such proof.

III.

We now address Polanco's challenges to his convictions on the Polanco Enterprise counts. Polanco contends that the district court erred in entering a judgment of conviction both for conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846 (count eight) and for engaging in a CCE in violation of 21 U.S.C. § 848 (count nine). He argues

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[3] Our opinion should not be construed, however, as holding that a gun supplier to a criminal enterprise can never be prosecuted under § 1959(a) for his relationship to that enterprise. For example, it is possible that Polanco's sale of guns to the Red Top Crew might support a finding that Polanco participated in Cargil's murder for the purpose of "gaining entrance to" the Red Top Crew. 18 U.S.C. § 1959(a). Additionally, it is possible that evidence of Polanco's driving the car during the test demonstration and repairing the machine gun so that Sepulveda could kill Cargil and Polanco could consummate the gun sale might support a finding that Polanco participated in Cargil's murder "as consideration for the receipt of . . . anything of pecuniary value" from the Red Top Crew. *Id.* Because the government did not pursue these theories at trial, however, we will not now affirm the conviction on either of these bases.

that convicting him on both counts violates the Double Jeopardy Clause of the Fifth Amendment. The government concedes this and we agree.

A conviction under both the conspiracy and the CCE statutes is unconstitutional where the alleged CCE is the same enterprise as the conspiracy. *See Rutledge v. United States,* 517 U.S. 292, 300 (1996). The alleged CCE — the Polanco Enterprise — is the same enterprise as the conspiracy, and Polanco's conviction for drug conspiracy under count eight of the indictment is vacated. However, we affirm Polanco's CCE conviction under count nine of the indictment. *See United States v. Miller,* 116 F.3d 641, 678 (2d Cir. 1997) (affirming CCE conviction despite remanding for dismissal of conspiracy conviction on Double Jeopardy grounds), *petition for cert. filed,* (U.S. Jan. 26, 1998) (No. 97-7630), *and petition for cert. filed,* (U.S. Feb. 26, 1998) (No. 97-8083).

IV.

Polanco also contends that his RICO conviction under 18 U.S.C. § 1962(c) (count one) for operating the Polanco Enterprise should be reversed. The government prosecuted Polanco under § 1962(c), alleging that Polanco committed seven predicate racketeering acts while operating his drug and gun distribution enterprise, including murdering Rivera, murdering Cargil, attempting to murder Moreno, and distributing drugs on at least four different occasions. While not disputing the relevance of Rivera's murder and Moreno's attempted murder to the Polanco Enterprise, Polanco argues that Cargil's murder was not related to his operation of the Polanco Enterprise and, thus, could not be considered as a predicate act of the Polanco Enterprise. He also argues that the "irrelevant" evidence of Cargil's murder was unfairly prejudicial to Polanco at trial. We disagree.

Pursuant to § 1962(c), it is "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The requisite pattern of racketeering activity may be established by demonstrating predicate acts that are related and pose a threat of continued criminal activity. *See United States v. Minicone,* 960 F.2d 1099, 1106 (2d Cir. 1992). Predicate acts "must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)." *Id.* A predicate act is "related" to an enterprise if it is "related to the activities of that enterprise." *Id.* (quotations omitted). A predicate act is related to a different predicate act if each predicate act is related to the enterprise. *See id.* We believe that a rational jury could find that Polanco's participation in Cargil's murder was related to Polanco's RICO enterprise.

The evidence shows that Polanco, as the leader of the Polanco Enterprise, sold guns to Sepulveda and the Red Top Crew to earn money for the Polanco Enterprise and to cultivate a relationship with Sepulveda and the Red Top Crew. Polanco hoped the gun sales would persuade the Red Top Crew to join forces with his own organization and further increase his power in the Project. Thus, each machine gun sale to Sepulveda, including the sale of the machine gun used to murder Cargil, was related to Polanco's RICO enterprise.

Cargil's murder clearly was related to Polanco's sale of the machine gun to Sepulveda. Each time Polanco sold Sepulveda a machine gun, Sepulveda would first test the machine gun to make sure that it was fully automatic. Sepulveda would not pay for the machine gun unless he was satisfied that the gun was operational. During one

such sale, Polanco drove Sepulveda to a highway so that Sepulveda could test the machine gun. Sepulveda tested the machine gun by attempting to shoot Cargil. When the machine gun jammed, Polanco repaired the gun so that Sepulveda could successfully shoot Cargil. A reasonable jury could easily conclude that shooting Cargil was a necessary precedent to consummating the gun sale, and that Cargil's murder was part-and-parcel of the gun sale. Accordingly, we find that Polanco's participation in Cargil's murder was related to the weapons distribution activities of Polanco's RICO enterprise and the evidence thereof certainly was relevant to Polanco's RICO conviction.

V.

Polanco also contends that his CCE conviction (count nine) should be reversed because the government failed to establish that the Polanco Enterprise consisted of at least five members whom Polanco supervised at the same time. We disagree.

Polanco first contends that the government must establish that he acted "in concert" with five other persons at the same time, and that evidence of five persons involved at various times does not support his CCE conviction. The Second Circuit has already rejected this argument. *See United States v. Young,* 745 F.2d 733, 747 (2d Cir. 1984); *see also United States v. Phibbs,* 999 F.2d 1053, 1084-85 (6th Cir. 1993) (noting that "[e]very circuit which has considered this argument has rejected it").

Polanco also contends that the government must identify the five people whom Polanco supervised by their full names, and that the government's identification of Polanco's supervisees only by first names or street names is insufficient. This argument ignores the fact that "[t]he CCE statute is directed against all enterprises of a certain size;

the identity of those involved is irrelevant." *United States v. Markowski,* 772 F.2d 358, 364 (7th Cir. 1985). Accordingly, it "is not necessary for the government to establish in every CCE case the specific identity of all five individuals subject to the defendant's direction." *United States v. Alvarez,* 860 F.2d 801, 817 (7th Cir. 1988), *aff'd in relevant part on reh'g sub nom. United States v. Holguin,* 868 F.2d 201 (7th Cir. 1989). Rather, the government need only "submit sufficient evidence to permit a rational jury to conclude that each of those [partially identified] individuals had been directed by the defendant." *Id.; see also United States v. Walker,* 912 F.Supp. 655, 662 (N.D.N.Y. 1996) (merely identifying supervisees by names of "Barney" and "Petey" is sufficient to support a CCE conviction because "[w]hile both individuals are somewhat sketchily identified there appears to be no indication that either is actually one of the other low-level sellers already identified as a CCE participant"), *aff'd in part, rev'd in part on other grounds,* Nos. 96-1544, 96-1545, 96-1546, 1998 WL 174606 (2d Cir. Apr. 15, 1998). In this case, there is abundant testimony indicating that Polanco supervised Michael Rivera, Stephen Almodoval, David Sanchez, Richard Mineo, Richard Mineo's brother "TK," Carmen Castro, a person named Jonathon, a person named Milagros or Milly, and others. Accordingly, we reject Polanco's contention that the government failed to sufficiently identify five persons whom he supervised in the CCE.

VI.

Polanco also appeals the sentence imposed by the district court on the Polanco Enterprise counts. Polanco contends that receiving consecutive sentences for his RICO conviction under 18 U.S.C. § 1962(c) and for his convictions under 18 U.S.C. § 1959 for murdering Rivera and attempting to murder Moreno for the purpose of maintaining or

increasing his position in the Polanco Enterprise, which were also charged as predicate acts in the RICO count, violates the Double Jeopardy Clause. We disagree.

"It is well settled that Congress sought to permit cumulative sentences for a RICO conviction and the predicate offenses upon which the RICO violation is premised." *United States v. Walsh,* 700 F.2d 846, 856 (2d Cir. 1983). Moreover, the Second Circuit has already held that the government may prosecute a defendant both under RICO for engaging in a pattern of racketeering activity and also under § 1959 for violent crimes intended to maintain or increase the defendant's position in the RICO enterprise. *See Concepcion,* 983 F.2d at 381. Accordingly, the district court did not err by imposing consecutive sentences for Polanco's RICO conviction and his substantive § 1959 convictions. *See Walsh,* 700 F.2d at 856 ("[W]here Congress has made sufficiently clear its intention to impose multiple punishments for the same act, imposition of such punishment is constitutional.").

VII.

Polanco raises numerous other issues in this appeal. Polanco contends that the indictment was multiplicitous, that prosecutor misconduct required a mistrial, that the district court erred in denying his request for a bill of particulars, and that the district court erred in removing a juror. After carefully reviewing the record, we determine that each of the arguments is meritless under the established law of the Second Circuit and does not require discussion. *See Casamento,* 887 F.2d at 1191 (refusing to discuss meritless arguments).

VIII.

For the foregoing reasons, we REVERSE Raymond Polanco's convictions and sentences on counts two and three, VACATE Polanco's conviction on count eight, and AFFIRM the convictions and sentences in all other respects.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

UNITED STATES
COURT OF APPEALS
FILED
JUL 22 1998
CAROLYN CLARK
CAMPBELL, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of July, one thousand nine hundred and ninety-eight.

USA

Appellee,

v

Dkt No: 97-1396

Polanco

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Raymond Polanco.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney